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No. 90-6531

In The

Supreme Court of the United States

October Term, 1991

KEITH J. HUDSON,

Petitioner,

v.

JACK McMILLIAN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. THE WANTON INFLICTION OF PAIN, REGARDLESS OF THE PRESENCE OR ABSENCE OF SIGNIFICANT INJURY, VIOLATES THE EIGHTH AMENDMENT

A. There Is No Support in the Court's Eighth Amendment Precedent for Imposing a "Significant Injury" Test

Respondents argue that the unjustified beating of a prisoner by correctional officers does not violate the Eighth Amendment unless the prisoner suffers "significant injury," by which they mean a visible, tangible, or otherwise objectively verifiable physical injury.[1] Respondents, however, fail to demonstrate that such a requirement has any basis in the Eighth Amendment as it has been applied by this Court. Nor has any court ever articulated a rationale for applying a "significant injury" standard.

The lower court first adopted a "significant injury" test in *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (*en banc*), a Fourth Amendment excessive force case. Seven judges dissented from that holding, pointing out that this added restriction on the scope of the Fourth Amendment was "imposed by *ipse dixit* without so much as a citation of authority or a statement of reasons for imposing [it]." *Id.* at 480 (Rubin, J., concurring in part and concurring in the judgment).[2] Moreover, since its decision in this case,

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[1] *See* brief of respondents at 22. Respondents nowhere in their brief discuss the possibility that a "significant injury" might not always require a physical injury. *Cf.* brief of United States at 13-14.

[2] As petitioner has already pointed out, this Court in *Graham v. Connor*, 109 S.Ct. 1865 (1989), did not adopt a

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even the Fifth Circuit appears to have retreated from respondents' position that the Eighth Amendment cannot be violated without proof of a significant *physical* injury.[3]

In an attempt to defend their position, respondents note that in the realm of medical care, the Eighth Amendment is violated only by deliberate indifference to "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). From this undisputed proposition, respondents argue that a beating by guards cannot violate the Eighth Amendment unless it causes "significant injury." The analogy is a faulty one, however, because it confuses two separate notions. The "serious medical needs" referred to in *Estelle* are not caused by the state; rather, they trigger the state's obligation to provide constitutionally adequate medical care. When the state defaults on that constitutional obligation, it is liable under the Eighth Amendment regardless of whether its deliberate indifference results in significant or lasting injury. Indeed, *Estelle* makes clear that the appropriate inquiry under those circumstances is

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"significant injury" test in the Fourth Amendment context. Brief of petitioner at 17-18 n.13.

[3] *See McCord v. Maggio*, 927 F.2d 844, 849 (5th Cir. 1991) (while a showing of "significant injury" is required before a prisoner can recover damages under §1983, this requirement is satisfied by a showing that the prisoner "endured pain, suffering, and/or mental anguish sufficiently significant to justify monetary relief;" the prisoner need not show "lasting harm").

The "significant injury" test also appears to defy consistent application. For example, in *Oliver v. Collins*, 914 F.2d 56, 59 (5th Cir. 1990), the court held that what is a "significant injury" may depend on the presence or absence of justification for the use of force, thus intertwining the objective and subjective components of the Eighth Amendment test.

whether the state's actions (or inactions) have led to the "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 104.[4] Respondents offer no plausible justification for imposing a higher standard in this case.

The analogy to "serious medical needs" relevant to this case would be serious interests in personal security. Deliberate indifference to either need would constitute a deprivation of "the minimal civilized measure of life's necessities" contrary to the Eighth Amendment, under *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). *See also DeShaney v. Winnebago County DSS*, 109 S.Ct. 998, 1005-1006 (1989):

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

(Citations omitted).

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[4] Consistent with this view, the lower courts have recognized that the Eighth Amendment can be violated when failure to treat a prisoner results in pain, even if it does not result in a worsening of the patient's condition. *See, e.g., Boretti v. Wiscomb*, 930 F.2d 1150, 1154-55 (6th Cir. 1991) (denial of dressing and pain medication for wound may violate Eighth Amendment, although wound did not become infected and eventually healed properly); *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988) (prisoner suffered from condition which "defied adequate prognosis and treatment," but certain treatments "eliminated pain and suffering at least temporarily;" denial of these treatments could violate Eighth Amendment).

Petitioner acknowledges that some interests in personal security, like some medical needs, may be too inconsequential to trigger constitutional protection. But the interest in not being beaten, kicked and punched by correctional officers, when no use of force is appropriate, surely passes over any reasonable threshold.

The recent case of *Wilson v. Seiter*, 111 S.Ct. 2321 (1991), also implicitly rejects the respondents' argument. In *Wilson*, the prison officials argued that a higher state of mind requirement should be applied in Eighth Amendment cases that do not rest on claims of physical injury. *Id.* at 2326. By its very nature, this argument presupposes that physical injury is not a prerequisite to all Eighth Amendment claims. More important for present purposes, the *Wilson* Court rejected the state's "suggestion that the 'wantonness' of conduct depends upon its effect upon the prisoner." *Id.* That conclusion is inconsistent with respondents' position that there is only one "effect upon [a] prisoner" that can ever give rise to an Eighth Amendment violation – namely, significant physical injury.

Finally, in their effort to establish a "significant injury" requirement, respondents quote selectively from *Graham v. Connor*, 109 S.Ct. at 1873 n.11. *See* brief of respondents at 35-36. The full quotation is as follows:

> We also suggested [in *Whitley v. Albers*, 475 U.S. 312 (1986)] that the other prongs of the *Johnson v. Glick* [481 F.2d 1028 (2d Cir. 1972)] test might be useful in analyzing excessive force claims brought under the Eighth Amendment. 475 U.S., at 321, 106 S.Ct., at 1085. But we made clear that this was so *not* because Judge Friendly's four-part test is some talismanic formula generally applicable to all excessive force claims, but because its four factors help to focus the central inquiry in the Eighth Amendment context, which is whether the particular use of force amounts to the "unnecessary and wanton infliction of pain." See *id.*, at 320-321, 106 S.Ct., at 1084-1085.

Graham, 109 S.Ct. at 1873 n.11 (emphasis in original).

This case involves only the objective prong of the Eighth Amendment test. An examination of the portions of *Whitley v. Albers*, 475 U.S. 312 (1986), cited by the *Graham* Court reveals that the *Whitley* Court found the "extent of injury inflicted" relevant to the *subjective* prong of the Eighth Amendment test. *Whitley*, 475 U.S. at 320-321. The objective prong of the test was simply not at issue in that case. *Id.*[5]

B. Pain Is the Appropriate Criterion for Judging Eighth Amendment Claims

As demonstrated in petitioner's opening brief, this Court has consistently analyzed Eighth Amendment claims to determine whether the challenged government action inflicted pain, not whether it resulted in significant injury. *See, e.g., Graham v. Connor*, 109 S.Ct. at 1872-1873 n.11, referring to "the central inquiry in the Eighth Amendment context, which is whether the particular use

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[5] Similarly, no issue involving subjective intent is presented by this case. Contrary to respondents' assertion, brief of respondents at 21 n.13, petitioner does not concede that the "malicious and sadistic" state of mind standard, rather than the "deliberate indifference" test, applies to the instant case. Rather, petitioner notes that, since the trial court found that respondents acted with malice, this question is not before the Court. Brief of petitioner at 10 n.6.

of force amounts to the unnecessary and wanton infliction of pain." (Citation and internal quotation marks omitted). Not all inflictions of pain result in physical injury, much less "significant" injury.[6]

Nevertheless, respondents urge that this Court abandon its traditional Eighth Amendment criterion of pain because "pain is a totally subjective phenomenon." Brief of respondents at 35. Of course no device can measure pain, as a thermometer can measure temperature or a scale can measure weight. But the acts that occurred here – punches to the eyes, mouth, chest and stomach and kicks to the body[7] – surely pass any reasonable

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[6] Thus, contrary to respondents' assertion in their brief at 32 n.26, petitioner does indeed dispute the propriety of the "significant injury" test.

[7] Respondents purport to "accept that they are now saddled with the findings of fact by the District Court and the approval of those factual findings by the Fifth Circuit," brief of respondents at 9, and then proceed to argue the facts throughout their brief. *See, e.g., id.* at 10 n.5, 11 n.7, 20 n.13. Because this Court's grant of certiorari is limited to the legal test applied by the court of appeals, *Hudson v. McMillian*, 111 S.Ct. 1679, 1680 (1991) (*mem.*), such factual argument is foreclosed.

Respondents are incorrect, however, in their assertion that "the fact-finding that [p]risoner Hudson suffered only 'minor injuries' is binding on [p]risoner Hudson." Brief of respondents at 11. All parties are indeed bound by the trial court's finding that the beating of petitioner resulted in "minor bruises and swelling to [petitioner's] face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable for three to four months." App. at 26. However, the trial court's overall description of these injuries as "minor" is not a finding of fact, but a characterization of the facts the court found.

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threshold.[8] From these objectively verifiable acts, it is possible to infer that pain occurred[9] – the pain an ordinary person would suffer upon, for example, being punched in the eyes. *See, e.g.*, Tr. at 79-80 (testimony of petitioner that beating cracked his dental plate,[10] split his

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Having already found respondents liable, the trial court was attempting to make an appropriate award of damages to petitioner. It was in this context that the court characterized his injuries as "minor." Nevertheless, the trial court found that petitioner's injuries merited an award of $800. App. at 29. Thus, the court obviously believed petitioner's injuries to be more than trivial. *Cf. McHenry v. Chadwick*, 896 F.2d 184, 186 (6th Cir. 1990) (prisoner was beaten to the ground by six officers who struck him in the back, stomach, and legs, including one officer who beat him with a club; prisoner was awarded $150.00 in compensatory damages).

[8] Certain inflictions of *de minimis* pain would not violate the Eighth Amendment. All parties and amici agree that not every unconsented touching of a prisoner by a guard violates the Eighth Amendment. The disagreement concerns the nature of the threshold.

[9] In *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), this Court held that prison conditions violate the Eighth Amendment when they result in "unnecessary and wanton infliction of pain." Accordingly, ever since *Estelle*, the lower courts have been required to make inferences about whether the failure to provide medical care inflicted pain. The lower courts have been able to make such determinations without any apparent difficulty. *See also Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (determining that overcrowding did not inflict pain and therefore could not violate the Eighth Amendment).

[10] Respondents assert that "[t]he damage to [p]risoner Hudson's partial dental plate is damage to property and not to the person, and will not hereinafter be considered as part of the physical injuries received." Brief of respondents at 12 n.8.

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lip, loosened his teeth, caused pain in his chest, and rendered his eyes bruised and swollen).

Respondents express concern about the potential for a "swearing contest" and the need for an evaluation of credibility.[11] Brief of respondents at 35. However, a need

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Petitioner, however, submits that cracking his dental plate by repeatedly punching him in the mouth while he was wearing it constitutes an injury to the person. *See* Tr. at 79, lines 2-15. Moreover, the fact that petitioner was hit hard enough to crack a dental plate inside his mouth is highly probative of the amount of force used and the pain inflicted.

[11] Respondents cite statistics from the Administrative Office of the United States Courts, purporting to show a slight increase in "prisoner filings" between 1985 and 1989. Brief of respondents at 15 n.9. The implicit argument is that this Court should impose a "significant injury" requirement simply to discourage and facilitate summary disposition of prisoner lawsuits.

However, the statistics cited by respondents are most unenlightening. For example, we are not told if these figures include habeas corpus actions, which accounted for 38% of all prisoner cases between 1974 and 1985. Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 661 (1987). Nor do these numbers take into account the fact that the number of state and federal prisoners increased by 134% between 1980 and 1990. Bureau of Justice Statistics Bulletin, *Prisoners in 1990*, May 1991, p.1. In reality, between 1975 and 1984, combined habeas corpus and prisoner civil rights filings increased at only half the rate of total civil filings. Eisenberg & Schwab, *supra*, at 693 n.212.

At any rate, this Court should not restrict the availability of a Congressionally-created remedy for a constitutional violation simply because, in the view of some, too many people are availing themselves of it. This Court has held that the Court's role, when concerns about federal caseloads are raised, "is not to make policy, but to interpret [federal law]." *Neitzke v. Williams*, 109 S.Ct. 1827, 1832 (1989). The federal courts are bound

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to resolve differing views of the facts is the essence of litigation, and is certainly not limited to lawsuits brought by prisoners alleging excessive force. Indeed, one of the core functions of the finder of fact is to make evaluations of credibility. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 574-575 (1985).[12]

In sum, respondents urge this Court to jettison its traditional Eighth Amendment test and embrace a new standard that has no rationale and has proved impossible

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to enforce the Constitution, even if it requires the adjudication of additional cases. As Justice Harlan recognized a generation ago:

> Judicial resources . . . are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Harlan, J., concurring in the judgment).

[12] As this case well illustrates, even the presence of objectively verifiable injuries by no means eliminates the possibility of a "swearing contest." *See* brief of state attorneys general at 10 n.6:

> Usually the inmate claims that he did nothing to provoke an attack and is baffled by the fact that the officers felt the need to use force. . . . The officers' claim generally is that the inmate resists the move or is otherwise recalcitrant (although in this case the officers deny that the incident ever took place).

to apply consistently. It is an invitation this Court should decline.

II. THE UNJUSTIFIED BEATING OF A PRISONER BY CORRECTIONAL OFFICERS VIOLATES THE EIGHTH AMENDMENT

A. The Beating of Petitioner Was Not an Act of Private Revenge

Respondents argue that the beating of petitioner does not violate the Eighth Amendment because it was "an act of private revenge;" because the state officers involved were "lower-ranking correctional personnel;" and because the beating was an "isolated incident." These arguments individually are unavailing, as set forth below and in petitioner's opening brief.[13] Collectively, they seem intended to suggest that cruel and unusual treatment is not "punishment" unless it is somehow ratified as official policy or authorized by personnel bearing some unspecified degree of authority.[14]

Such an argument is contrary to the holding of *Wilson v. Seiter*, decided last term. *Wilson* stated a different and much simpler approach to the definition of punishment: "If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." 111 S.Ct. at 2325. (Emphasis in original).

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[13] Petitioner discussed the "isolated incident" argument in his opening brief at 34-37.

[14] Such arguments, while perhaps relevant to the liability of the State of Louisiana, *cf. City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988), have no bearing on the liability of the individual officers who actually administered and approved the beating of petitioner.

This *Wilson* analysis is applicable to *any* "inflicting officer," from a line correctional officer to a prison warden or state commissioner. This analysis, in addition to its doctrinal merits, corresponds to the reality of prison life, in which lower-level employees wield enormous practical authority over every aspect of prisoners' lives, and possess equally great power to do harm by virtue of that authority and the insulation of prisons from public scrutiny.[15]

The respondents' argument that the beating of petitioner was merely "an act of private revenge rather than an action taken on behalf of the State of Louisiana through its prison officials" (brief of respondents at 31 n.25)[16] is squarely contradicted by the evidence introduced by respondents in the district court. According to respondent Woods, petitioner was being taken to the lockup unit because he and another prisoner were "causing a disturbance," and petitioner disregarded respondent Woods' "several direct verbal orders to stop

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[15] Eighth Amendment adjudication in the lower courts has demonstrated that many of the worst abuses of prisoners are perpetrated by relatively low-level staff members, often without the knowledge or authorization of their superiors and in direct contravention of the prison's official policies. *See, e.g., Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986) (campaign of torment of paraplegic inmates by prison officer); *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971) (directing an injunction against surreptitious and unauthorized physical abuse by line staff).

[16] Respondents repeatedly refer to the beating as involving a "personal dispute" between petitioner and respondents. *See, e.g.*, brief of respondents at 29 ("an essentially personal dispute between a prisoner and correctional security officers, outside of any regular penal activity of the prison").

hollering." App. at 14. Petitioner was cited for violation of prison rules (App. at 17), and was found guilty. App. at 12.

It is difficult to understand why respondents believe this to be a "personal dispute."[17] There is no contention that respondents were motivated by some dispute with petitioner that originated outside the prison walls and was unrelated to their relationship as prisoner and guards. Rather, respondents used their authority as officers of the state to place petitioner in restraints, remove him from his cell, beat him, and then charge him with rule violations.

Respondents' contention is actually an argument about "color of state law." As such, it was answered by the Court thirty years ago: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961), *quoting United States v. Classic*, 313 U.S. 299, 326 (1941) (plurality opinion) (internal quotation marks omitted).

In addition, respondents argue that the beating of petitioners does not implicate the Eighth Amendment because the officers involved, including Lieutenant Mezo, are "lower-ranking correctional personnel" (brief of

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[17] The State of Louisiana provided legal representation to respondents in the lower courts and in this Court, implicitly recognizing that the respondents' involvement in this case is inextricably intertwined with their role as agents of the State. *Cf. West v. Atkins*, 108 S.Ct. 2250 (1988), discussed in text, *infra*. The physician in *West*, like the respondents here, was represented by the State's Attorney General. *See id.* at 2253 n.4.

respondents at 13) rather than "high-ranking prison officials" (*id.* at 11). They attempt to distinguish *Whitley v. Albers* on the ground that there, the use of force was authorized by a "high-ranking prison official." *Id.* at 29-30. In reality, the officer in *Whitley* was a captain, one rank higher than a lieutenant. 475 U.S. at 315. Respondents provide no authority for the proposition that Eighth Amendment liability should turn on such picayune distinctions.[18]

Indeed, in *West v. Atkins*, 108 S.Ct. 2250 (1988), this Court implicitly rejected the proposition that only actions undertaken or condoned by supervisory staff can violate the Eighth Amendment. In that case, the Court held that a private physician, employed part-time to treat state prisoners, acts under color of state law for purposes of 42 U.S.C. § 1983. The Court assumed that the actions of such a physician could violate the Eighth Amendment:

> Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth

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[18] Respondents similarly attempt to distinguish *Hutto v. Finney*, 437 U.S. 678 (1978), on the ground that "[t]he activities complained of in *Hutto* were specifically approved and authorized by high-ranking prison officials, *id.*, 437 U.S. at 682 nn. 4-5." Brief of respondents at 30. The cited portion of *Hutto* says exactly the opposite. Footnote 4 states that prisoners were sometimes flogged with a leather strap for minor offenses, "[a]lthough it was not official policy to do so."

More fundamentally, the need to establish "official policy" is relevant only when the governmental entity is itself a defendant. *See, e.g., Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

> Amendment rights. The State bore an affirmative obligation to provide adequate medical care to [petitioner], the State delegated that function to respondent [physician]; and respondent voluntarily assumed that obligation by contract.

Id. at 2259 (footnote omitted).[19] If a physician who has no penological responsibilities, and certainly no supervisory responsibilities over correctional functions, can transgress against the Eighth Amendment, then *a fortiori* a correctional officer who beats a prisoner violates the Eighth Amendment.

Obviously no corrections system has an official policy allowing the punishment of prisoners through unprovoked beatings. To limit the scope of the Eighth Amendment to beatings that represented official policy would deprive prisoners of protection from cruel and unusual punishment resulting from physical abuse by corrections staff.

B. The Eighth Amendment Is the Primary Source of Protection for Convicted Prisoners Against Official Violence

Respondents argue that if the beating of petitioner violates any constitutional provision, it is the due process clause of the Fourteenth Amendment, rather than the Eighth Amendment. However, as amici state attorneys general recognize, "[t]he eighth amendment provides the

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[19] One Justice, concurring in the judgment, did not believe that a physician "who lacks supervisory or other penological duties can inflict 'punishment' within the meaning of that term in the Eighth Amendment." *Id.* at 2260 (Scalia, J., concurring). Even under this view, respondents – who surely have "penological duties" – can indeed inflict punishment.

substantive source of constitutional protection for convicted prisoners in the prison security context." Brief of state attorneys general at 4. Indeed, this Court has made that clear:

> We need say little on this score. We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified.

Whitley, 475 U.S. at 327. *See also Graham v. Connor*, 109 S.Ct. at 1871 n.10 ("Any protection that 'substantive due process' affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment," citing *Whitley*).[20] This principle is well settled; *see, e.g., Ingraham v. Wright*, 430 U.S.

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[20] Indeed, in *Graham*, this Court criticized the indiscriminate use of "substantive due process" when more specific constitutional provisions apply:

> In the years following *Johnson v. Glick* [481 F.2d 1028 (2d Cir. 1972)], the vast majority of lower federal courts have applied its four-part "substantive due process" test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.
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> * * *
>
> We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. . . . In addressing an excessive

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651, 669 (1977) ("Prison brutality . . . is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny") (citation and internal quotation marks omitted). Accordingly, the lower courts were correct to analyze this case under the Eighth Amendment.

C. Even if Petitioner's Claim Did Arise Under the Due Process Clause, the Existence of State Remedies Is Irrelevant

As demonstrated in the preceding section, petitioner's claim arises under the Eighth Amendment, not the due process clause. But even if respondents were correct that petitioner's claim were a due process claim, they are incorrect that the existence of state court remedies is relevant. Respondents attempt to argue that petitioner's claim arises under the due process clause because they seek to establish the position that since "the State provides pre-deprivation restrictions and post-deprivation remedies" for use of force, a violation of due process under the Fourteenth Amendment has not

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> force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct.

Graham, 109 S.Ct. at 1870 (footnotes and citations omitted).

occurred. Brief of respondents at 42-43.[21] The flaw in respondents' argument is that petitioner's claim, if it were a due process claim, would be based upon substantive, not procedural, due process, as respondents concede.[22]

In *Zinermon v. Burch*, 110 S.Ct. 975 (1990), this Court authoritatively rejected any claim that state remedies are relevant to the existence of a substantive due process claim:

> [T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. As to [substantive due process claims], the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. A plaintiff, under *Monroe v. Pape*, may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.

Id. at 983. (Internal citations and quotation marks omitted).

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[21] It is interesting that respondents urge the Court to trust to the availability of state-created remedies while the State continues to reject the factual findings of the trial court. *See* brief of respondents at 10. If the State remedies were meaningful they would have been triggered by the findings of the trial court, and the State would have proceeded against the respondents rather than represent them in this Court. Of course, the right to a § 1983 remedy does not depend on the inadequacy of state remedies. *Monroe v. Pape*, 365 U.S. at 183.

[22] Respondents concede that any due process claim that could be asserted by petitioner is a claim of substantive due process. Brief of respondents at 42.

III. THE EIGHTH AMENDMENT PROHIBITS THE RESPONDENTS' CONDUCT

Respondents object to petitioner's citation of the fact that numerous states and the federal government have criminalized brutality by prison guards, and that correctional organizations similarly condemn this practice. These facts, respondents argue, are irrelevant to the determination of whether the practice violates the Eighth Amendment. Brief of respondents at 36-37 n.30. However, *Stanford v. Kentucky*, 109 S.Ct. 2969 (1989). establishes the relevance of petitioner's citations:

> As we have said, Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.
>
> * * *
>
> [F]irst among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives.

Id. at 2975 (citations and internal quotation marks omitted). The Court then examined state statutes regarding the execution of minors to determine whether a national consensus existed on this issue. *Id.* at 2975-76. Significantly, none of the briefs submitted to the Court in this case on either side defend the conduct of the respondents as remotely resembling appropriate staff behavior.

It is critical to remember what is at stake in this case. The court of appeals, in rejecting petitioner's Eighth Amendment claim, recounted petitioner's injuries as follows:

> The evidence reflects that on October 30, 1983 Hudson got into an argument with McMillian who punched Hudson in the mouth, eyes, chest, and stomach while Woods held him. The blows cracked Hudson's partial dental plate, split his lower lip and loosened his teeth. He received bruises to his body but no other cuts. Woods kicked Hudson on his backside. Mezo, the supervisor of McMillian and Woods, watched the beating but merely cautioned the officers not to "have too much fun."

App. at 31.

If the Court rejects petitioner's arguments, then this beating was constitutional, and correctional officers who administer such unauthorized and unjustified beatings will no longer be restrained by the federal courts. The wanton brutalization of prisoners by guards is as abhorrent as the Tucker telephone[23] and equally inconsistent with evolving standards of decency. This Court should not endorse an interpretation of the Eighth Amendment that requires the federal courts to ignore such abuses of official power.

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[23] *See* petitioner's opening brief at 22 n.18.

CONCLUSION

For the above reasons, petitioner urges this Court to reverse the court of appeals and reinstate the judgment of the trial court in favor of petitioner.

Respectfully submitted,

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